



UNITED STATES
DEPARTMENT OF THE INTERIOR
OFFICE OF THE SOLICITOR
WASHINGTON, D.C. 20240

MAR 16 1976

Memorandum

To: Director, Bureau of Land Management

From: Associate Solicitor
Division of Energy & Resources

Subject: Title to submerged lands for purposes of administering ANCSA

Enclosed you will find a discussion of the law pertaining to the title to underwater lands in Alaska. It is hoped that this will assist your agency in carrying out its responsibilities under the Alaska Native Claims Settlement Act.

Hugh C. Garner

Enclosure



DISCUSSION OF LAW PERTAINING TO DETERMINATION OF
TITLE TO LANDS IN ALASKA FOR PURPOSES OF ADMINIS-
TERING THE ALASKA NATIVE CLAIMS SETTLEMENT ACT

I. INTRODUCTION

In carrying out its responsibilities under the Alaskan Native Claims Settlement Act (Pub. L. 92-203; 85 Stat. 688; 43 U.S.C. Sec. 1601 et seq.) the Bureau of Land Management must determine whether lands within native selections are considered to be federally owned. Such determinations by the Bureau are solely to permit it to perform its administrative functions under the Act. The determinations by BLM will not decide legal disputes with respect to title, determine or adjudicate title, or have any other affect on legal title, whatsoever. Legal title to the lands is established by law. In determining whether the BLM will consider the land in question to be federally owned, the Bureau employees should be guided solely by the applicable law.

The Bureau will be required to make these determinations on all lands within the native selections. The responsibilities of the Bureau are the same for both upland and underwater land. However, the law applicable to the title to uplands and under water lands is substantially different.

The sole purpose of this paper is to set forth for the Bureau employees a summary of the law applicable to the title of underwater lands in the State of Alaska to assist them in performing their administrative functions. This is not

intended to supplement existing law or otherwise constitute a source of substantive law.

Although this is intended to be an accurate summary of the law and sufficient for its purposes, there may be instances where it is felt to be ambiguous or insufficient to make a determination. In such cases the Bureau employees should be guided by applicable case, and statutory law, and should not limit their review of the law to this paper. When considering the question of the navigability of a body of water, the Bureau employees should not be guided by the administrative regulations of the Army Corps of Engineers, the Coast Guard, the Federal Power Commission or other agencies having regulatory jurisdiction over waters. These agencies, for some purposes, exercise jurisdiction beyond the waters which are considered navigable for purposes of determining title, while for other purposes they exercise a more limited jurisdiction.

II. FEDERALLY OWNED LANDS

A. Historically, the Federal Government was the owner of all lands within the State of Alaska. It remains the owner of all lands which have not been granted to others or the State by statute, patent, treaty, or other conveyance.

B. Certain underwater lands (more particularly described in Paragraph III) were granted to the State by the Submerged Lands Act (43 U.S.C. 1301, et seq.) applied to Alaska by the Alaska Statehood Act (P.L. 85-508, July 7, 1958, 72 Stat. 339,

as amended). Excluded from the general grant to the State and still in Federal ownership are upland or underwater lands which fall into any of the following categories:

1. All land or parcels of land together with all accretions thereto, title to which has been lawfully and expressly acquired by the United States from the State of Alaska or from any person in whom title had vested under the law of the State or of the United States and lands which the United States lawfully holds under the law of the State of Alaska.

2. All lands acquired by the United States by eminent domain proceedings, purchase, cession, gift or otherwise in a proprietary capacity.

3. All lands expressly retained by or ceded to the United States when the State of Alaska entered the Union, including all Federal reservations and withdrawn lands in existence at the time the State entered the Union.^{1/}

4. All lands filled in, built up, or otherwise reclaimed by the United States for its own use as of the date of statehood.

5. Lands actually occupied by the United States under a claim of right as of the date of statehood.

6. Any lands or interest in lands which are held by the United States for the benefit of any tribe, band or

^{1/} This includes underwater lands within the exterior boundaries of the reservation or withdrawal, United States v. Alaska, 423 F.2d 764 (9th Cir. 1970).

for individual Indians.

C. If there is no patent or similar conveyance particularly describing a given parcel of land, the land should be assumed to be in Federal ownership unless it is expressly found to be described in subparagraph III(B).

III. STATE OWNED LANDS

A. Under the Submerged Lands Act, Alaska was given title to lands which:

1. Are not within one of the categories set forth in subparagraph II(B); and
2. Are within one of the categories set forth in subparagraph III(B).

Title should be considered to be in the United States unless it is expressly found that the land in question satisfies both of these tests.

B. The State is the owner of lands within the boundaries of the State which are not included in one of the categories of Federal ownership listed in subparagraph II(B) and which are found to be within one of the following categories.

1. All lands permanently or periodically covered by tidal waters up to but not above the line of mean high tide.
2. All lands which are covered by nontidal waters that were navigable under the laws of the United States at the time the State became a member of the

Union, up to the ordinary high water mark as heretofore or hereafter modified by accretion, erosion, and reliction.

3. Included in categories (1) and (2) are all filled in, made, or reclaimed lands which at time of statehood were lands as described in subparagraphs (1) and (2) herein.

IV. DETERMINATION OF NAVIGABILITY

Before determining that lands will be considered to be owned by the State of Alaska because they fall within paragraph III(B) (2), it will first be necessary to determine that the lands are covered by waters which were navigable under the laws of the United States at the time of statehood. The law applicable to determining whether the waters are navigable under the test for determining title is summarized below. In reviewing cases, one should refer to cases involving title questions keeping in mind that there are other tests of navigability for other purposes. Navigable waters are defined as follows:

"[Bodies of water] must be regarded as public navigable [water bodies] in law which are navigable in fact and they are navigable in fact when they are used, or are susceptible of being used, in their ordinary condition, as highways for commerce, over which trade and travel are or may be conducted in the customary modes of trade and travel on water...." The Daniel Ball, 77 U.S. (10

Wall.) 557, 563 (1871).

A. Natural and Ordinary Conditions of the Water Course:

The determination of navigability is limited to the natural and ordinary or original condition of the water body as of the date of statehood, January 3, 1959. United States v. Appalachian Power Co., 311 U.S. 377 (1940).

B. Highways of Commerce: Navigable bodies of water are waters which are used or are susceptible of being used in their ordinary condition as highways for commerce over which trade or travel may be conducted in the customary modes of trade and travel on water. Thus, to be navigable, a body of water must be useable as a highway for purposes of traveling on the water from one point to another, by commercial vessels which float upon the water. The Daniel Ball, 77 U.S. (10 Wall.) 557 (1870), The Montello, 87 U.S. (20 Wall.) 430 (1874). The use of the water as a landing field for aircraft, or its susceptibility for such use does not make the body of water navigable.

C. Commercial Craft: The water must be useable by commercial craft, such as commercial ferry operations, barges or other boats used to ship commercial quantities of items which move in commerce, or commercial fishing craft, or any other floating water craft common or well suited for commercial use in the locality. Water sufficient only for use by small flat bottomed trapping or sport fishing boats or small canoes is not navigable.

The Montello, supra, United States v. Oregon, 295 U.S. 1 (1935).

Although cases have supported findings of navigability based upon commercial use of frontier craft such as bateaux, these craft were of a commercial size with substantial crew and capable of carrying commercial quantities of goods. Economy Light & Power Co. v. United States, 256 U.S. 113 (1921).

The test is the water body's susceptibility to use for commercial navigation, not its present or past use. Thus, a body of water which could be used for commercial navigation, but because of the lack of commercial need has not been so used, would be considered to be navigable. United States v. Utah, 285 U.S. 64 (1931).

D. Seasonal Variations: Waters which are navigable only during periods of spring floods are not considered navigable. It is not necessary that the river be navigable throughout the year, or even most of the year. If, after the spring floods have receded and the ice has melted, the river is navigable at its normal flow, it is considered to be navigable. Oklahoma v. Texas, 258 U.S. 574 (1922).

E. Accessibility: A body of water which is situated in natural surroundings making it inaccessible for use as a highway of commerce is not navigable. Thus, a river which would otherwise be considered navigable but which is located in a deep canyon and not accessible for commercial use by land or water would not be navigable. United States v. Utah, 283 U.S. 64 (1931).

V. EXTENT OF STATE OWNERSHIP

If it is determined that a body of water is navigable and that therefore there are lands considered to be owned by the State under subparagraph III(B)(2), it will be necessary to determine the limits of the State owned lands.

A. Breadth of Navigable Body of Water: A determination of navigability applies laterally over the entire surface of the water body. Thus, a wide river or lake which is navigable only through a narrow channel will be considered navigable from one shore to the other. United States v. Chicago, Minn. St. P&P.R. Co., 312 U.S. 592 (1941), United States v. Holt Bank, 270 U.S. 49 (1926). Swamp and marshes are not considered to be bodies of water. Thus, when a swamp or marsh adjoins a navigable body of water, it will be necessary to determine the boundary between the body of water and the marsh or swamp lands. This is true even though occasionally water from the navigable body of water may enter the swamp or marshland. Niles v. Cedar Point Club, 175 U.S. 300 (1899).^{2/}

B. Upper Limit of Navigability: The character of a navigable river will, at some point, change from navigable to non-navigable. The State's ownership of the bed of the river will not extend upriver beyond the upper limit of navigability. Where the upper limit of navigability is not easily established at a given point (such as the confluence of two non-navigable

^{2/} Under Section 6(1) of the Alaska Statehood Act, the swamp lands acts are not applicable to Alaska.

branches or a waterfall), it will be necessary to exercise judgment in determining the upper limit of navigability.

United States v. Rio Grande Irrigation Co., 174 U.S. 690 (1899).

C. Existence of Obstructions: Impediments to navigation such as sand bars, or rapids do not necessarily make the river non-navigable for purposes of title, even at that particular point. Where the impediment is of short duration on a river, the State's ownership of the bed will extend through the impediment. Where an obstruction to navigation is of great length (for example, a rapids through a canyon for a number of miles), the river is not considered navigable at that point and the State's ownership of the bed will not extend through the obstruction. United States v. Utah, 283 U.S. 64 (1931).

D. Changes in the River Bed or Lake Bed: The bed of a river or lake may change through erosion, accretion, reliction and avulsion.

1. Erosion is the wearing away of the bank by the action of the water.
2. Accretion is the buildup of the bank by the river's depositing of materials.
3. Reliction is the receding of the water from its former level. This ordinarily happens when the main channel of a river deepens, permitting the

waters to flow in a narrower channel, or when the volume of water in a river or lake is reduced.

4. Avulsion is the sudden change in the course of a river, for example, when a river jumps its banks and cuts a new channel.

Title to the river bed is not affected by avulsive changes. The owner of the bed of a river which has changed its course by avulsion remains the owner of the former river channel. However, title to the land moves with the water body when the changes in the bed are a result of erosion, accretion, or reliction. Bonelli Cattle Co. v. Arizona, 414 U.S. 313 (1973); Arkansas v. Tennessee, 246 U.S. 158 (1918).

E. The High Water Mark: The bed of a river or lake is that portion of the river or lake which is adequate to contain it at its ordinary high water mark without regard to the extraordinary freshets of the winter or spring or extreme droughts of summer or autumn. United States v. Chicago, Minn. St. P.&R.R. Co., supra, 43 U.S.C. 1301. Just as the high water mark can be changed by erosion and accretion and by reliction resulting from a deepening of the channel, the ordinary high water mark may also be changed by changes in the ordinary volume of water in the stream or lake. If the volume of water ordinarily delivered to the stream from its source increases, resulting in a widening of the river, the land in ownership

would correspondingly be increased. Conversely, as the ordinary volume of water from the source decreased, narrowing the river, the land in State ownership would decrease. The purpose of State ownership is to give the sovereign control of navigable waters so that it may hold them in trust for use by the public as highways navigation and for fishing, not to give the State title to the land itself. Bonelli Cattle Co. v. Arizona, supra.

F. Braided Glacial Streams: There has been some questions raised with respect to the difficulty in determining the bed (and therefore the extent of State ownership) of navigable braided glacial streams. If it is determined that a braided glacial stream is navigable an attempt should be made to apply the principles discussed herein to such rivers. The extent of State ownership is limited by the upper limit of navigability as of the date of Statehood and laterally by the ordinary high water mark, without regard to seasonal floods. Difficult questions in this area as in other areas may be submitted to the Solicitor's Office for guidance.

G. Date as of Which Determinations Should be Made: Determinations of navigability should be based upon the state of the body of water as of the date of Statehood. Similarly, the extent of State ownership should be determined on the basis of the body of water as of the date of Statehood as modified by erosion, accretion, or reliction. Changes in

the bed of a stream resulting from avulsion subsequent to Statehood, ~~do not~~ change the ownership of the land.

VI. RECOMMENDED PROCEDURE

In determining whether lands will be considered to be federally owned, you should first ascertain whether Federal ownership has been granted by patent or similar conveyance. If Federal title has been conveyed there is no need to make any further inquiry into the question of State or Federal title. If there is no document of conveyance, it should be assumed that the land remains in Federal ownership. If there is a question as to State ownership, the next step should be to determine whether the lands involved fall within the categories set forth in subparagraph II(B). If they do, no further examination into title is required--the lands are federally owned. If not, it next should be determined whether the lands fall within the description of subparagraph III(B)(1). If it is found that they do, title is in the State.

For the remaining underwater lands where there is a question of State title, a determination of navigability of water as of the date of statehood will be necessary as a step in determining title. For many bodies of water (the Yukon River, for example), navigability will be obvious. The only determinations necessary will be the location of the banks.

For other bodies of water a closer look at the relevant facts will be necessary to determine whether the State owns the bed and if so, the limits of State ownership as described in Paragraph V.

We recommend that the employees collecting the relevant facts for a particular body of water utilize a checklist similar to the one enclosed herewith as Attachment A. After the facts pertaining to a particular body of water are known, an application of the law pertaining to navigability should establish whether the body of water is navigable, and the extent of State ownership of the bed.

Although the decision as to whether to consider a particular parcel of lands as federally or State owned must be made by the Bureau of Land Management, the Solicitor's Office will be able to assist by answering questions of law which might occur from time to time.

ATTACHMENT A
REPORT OF FINDINGS

The purpose of this form is to assist the Bureau of Land Management in determining whether a body of water is navigable, and if so the limits of State ownership of the bed. For rivers, the findings should be reported for each point at which the river changes in character.

- (1) Name of water body.
- (2) Tributary to.
- (3) Physical characteristics.
 - (a) Type (river, stream, slough, lake, etc.)
 - (b) Length
 - (c) Approximate discharge volumes:
 - Maximum
 - Minimum
 - Mean
 - (d) Width and depth:
 - Maximum
 - Minimum
 - Mean
 - (e) Fall per mile.
 - (f) Extent of ordinary high water mark.
- (4) Nature and location of significant obstructions to navigation on portions of the water body used or susceptible of use in commerce.

(5) Past or present commerce:

(a) General types, extent, and period in time.

(b) Documentation if necessary.

(6) Susceptibility of use in commerce on January 3, 1959,
in the water body's natural and ordinary condition.

(7) Nature of jurisdiction known to have been exercised
by Federal agencies, if any.

(8) State or Federal Court decisions relating to navig-
ability of water body, if any.

(9) Remarks.